SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 481

FIRST CAMDEN NATIONAL BANK & TRUST CO.,
Petitioner,

v.

DONALD T. LAPINSOHN and
CAROL LAPINSOHN, his wife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

YALE B. BERNSTEIN
Attorney for Respondents

Of Counsel:
BRICKLEY, TORPEY & BERNSTEIN,
1300 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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Respondents, Donald T. Lapinsohn and Carol Lapinsohn, his wife, oppose the petition for a writ of certiorari to the Superior Court of Pennsylvania heretofore filed by the First Camden National Bank and Trust Company, and state below the grounds and reasons for their opposition.

QUESTION PRESENTED

Did not the Superior Court of Pennsylvania correctly hold that the funds of a company on deposit in a national

bank chartered in Camden, New Jersey, may be garnished at the Bank's full service branch bank in Philadelphia, Pennsylvania, where the Bank permits the depositor to withdraw its funds at the Bank's Philadelphia or New Jersey branches interchangeably?

STATEMENT OF THE CASE

Donald and Carol Lapinsohn, respondents herein, entered into an agreement in Philadelphia, Pennsylvania, with Lewis Charles, Inc. (hereinafter called Charles) on October 20, 1965. Under this contract, Charles agreed to construct a home in Cherry Hill, New Jersey for respondents. On April 27, 1966, respondents and Charles entered into a supplemental agreement, also in Philadelphia, containing certain warranties and guarantees concerning the construction of this new home. In reliance upon these agreements, settlement was made in Philadelphia and respondents who were Philadelphia residents at this time moved from their home in Philadelphia to their new home in Cherry Hill, New Jersey.

Soon after, respondents noted evidence of grossly improper construction of their home. Unable to secure relief amicably, they instituted an action for damages against Charles in the Common Pleas Court of Philadelphia, Pennsylvania, by means of a writ of foreign attachment seeking to attach Charles' bank account on deposit with petitioner bank (R. 4a).

Petitioner is a national bank, chartered in Camden, New Jersey, with branch banks in New Jersey and in Philadelphia, Pennsylvania. The Bank's Philadelphia branch is a full service bank containing a full range of banking services (R. 32a-33a, 44a-55a). Under the Bank's own rules, a depositor can withdraw its funds at any of the Bank's branches, whether in New Jersey or Pennsylvania, irrespective of in which branch it makes its deposit (R. 27a, 34a).

Located at the Philadelphia branch at the time of the attachment[1] (and by virtue of the Bank's rules, also at all other branches of the Bank) was $9,500 on deposit by Charles, the full amount of respondents' claim at that time.

Under *Pennsylvania Rule of Civil Procedure*, 1253[2], the Bank was made a garnishee since it owed a debt to Charles and had property of Charles, (to wit, Charles' deposit) in its custody, possession and control. The writ was duly served on garnishee at its Philadelphia branch by virtue of Rule 1257, on November 25, 1966.

Venue was secured in Philadelphia under Rule 1254 on the grounds, as shown above, that Charles' bank account was located, *inter alia*, in Philadelphia County,[3] and the garnishee was served in Philadelphia County.

The Bank thereupon filed preliminary objections to the writ alleging that it was immune from suit in Pennsylvania under the venue requirements of 12 *U. S. C.* §94. At the same time Charles filed its own Preliminary Objections raising the plea of forum non-conveniens. Charles' objections were dismissed by the Common Pleas Court (R. 62a) and Charles did not appeal from this decision.

On December 16, 1966, respondents filed their answer and new matter to the petitioner's preliminary objections alleging, *inter alia*, that the Bank, by its conduct, had consented to being made a garnishee in Pennsylvania, and denying that the instant attachment was an action or pro-

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[1] Petitioner admits that absent the attachment, Charles could have withdrawn this amount at the Philadelphia branch (R. 34 a) and there was at this branch sufficient funds to pay Charles this amount (R. 34 a).

[2] All Pennsylvania Rules cited herein are set forth at length in petitioner's petition, (pp. 17a-20a).

[3] It should be noted that the bank has always recognized that when it is made a garnishee by an action initiated in New Jersey, that attachment is binding in prohibiting its depositors from withdrawing those funds in Pennsylvania as well as in New Jersey (R. 55a, 36a).

ceeding against the bank subject to the provisions of 12 *U. S. C.* §94 (R. 19a-21a).

On March 21, 1967, depositions were taken in Philadelphia of two officers of the Bank (R. 23a et seq.). On May 29, 1967, the Court of Common Pleas of Philadelphia sustained petitioner's preliminary objections and dissolved the writ. However, on June 9, 1967, respondents appealed to the Superior Court of Pennsylvania which on March 21, 1967 filed its opinion and order reversing the Court below and reinstating respondents' writ. On March 29, 1968, petitioner filed a petition for reargument with the Superior Court which was denied on April 16, 1968. On May 6, 1968, petitioner filed with the Supreme Court of Pennsylvania, a petition for allowance of an appeal which was denied on June 10, 1968.

ARGUMENT

1. *12 U. S. C. §94 Does Not Apply to Actions Against a Third Party Naming a National Bank as Garnishee.*

At the outset, it is important to note that the petitioner bank is not a direct defendant in this case, but is merely a garnishee in an action between two private parties, respondents and Charles.

The venue prohibitions of Section 94 concern themselves solely with "actions and proceedings *against*" a national bank. We submit that an action against a third party commenced by a writ of foreign attachment is not an "action or proceeding *against*" a national bank named a garnishee in that matter. Foreign attachment is not an action, or a form of action, but merely an original writ; a form of process used to commence an action, not against a person, but against a res. *United Industrial Corp. v. Nuclear Corp. of America*, 237 F.S. 971 (D. C. Del. 1964); *Atkins v. Canadian SKF Co.*, 353 Pa. 312 (1946); *York Corp. v. Super Service Freight*, 74 York L. R. 89 (1960).

It "is nothing more than 'the equivalent of a summons for the commencement of a personal action'." *Plum v. Tampex*, 402 Pa. 616, 168 A. 2d 315; cert. den. 82 Ct. 46, 368 U. S. 826.

Therefore, the attachment was not an "action or proceeding against" the bank, but a form of process directed against the property of Charles, and not subject to 12 *U. S. C.* §94.

There apparently have been no reported cases directly on this question. However, in *Earle v. Conway*, 178 U. S. 449, 44 L. Ed. 1146 (1900), a plaintiff had secured a judgment against a private defendant, and had served a national bank as a garnishee. The bank resisted that attachment on the grounds that 12 *U. S. C.* §91 prohibits attachments *against* a national bank before final judgment in any suit. In this case your Honorable Court held, at p. 454:

> "Whatever may be said of the scope of Section 5242 [12 U. S. C. §91], an attachment sued out *against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it* within the meaning of that section. *It is an attachment to reach the property or interests held by the bank for others.*" (Emphasis supplied.)

This decision, we respectfully submit, is equally applicable to the venue provisions of 12 *U. S. C.* §94, and is authority for the proposition that an action commenced against a third party by means of a writ of foreign attachment naming a national bank as a garnishee is not an "action or proceeding against" the bank and is therefore not within the contemplation of that statute.

In addition, in *Casey v. Adams*, 102 U. S. 66 (1880), your Honorable Court held that Section 94 does not apply to *in rem* actions. Since, under applicable Pennsylvania law, the writ is directed against the property of the defendant located in Pennsylvania, it is an *in rem* action with regard to this property.

Therefore, we respectfully submit, Section 94 does not apply to the matter *sub judice* where the national bank is merely a garnishee.[4] Consequently, it is unnecessary to consider those arguments presented by petitioner in its petition for a writ of certiorari, which arguments erroneously assume Section 94 does apply.

II. *Petitioner Has Waived 12 U. S. C. §94 and May Be Made a Garnishee in Pennsylvania by Virtue of Its Operating a Branch Bank in Pennsylvania.*

Petitioner's main thrust relies primarily on a proposition that is not the issue in this case. Petitioner attempts to present the decision of the Superior Court in this case as a conflict between a federal venue statute and a Pennsylvania "doing business" doctrine. Throughout its petition, petitioner not only raises this straw man, but continually unjustly attacks the motives of the Superior Court for not deciding the case as petitioner would like it decided.

We respectfully submit that the issue is not a conflict between these two doctrines, but solely a question of whether a national bank, *by its own actions, and its own rules*, can waive the venue statute which has been enacted for its own benefit.

Your Honorable Court has recognized the concept of waiver with regard to Section 94. See *First National Bank of Charlotte v. Morgan*, 132 U. S. 141 (1889). Also see Justice Black's concurring opinion in *Michigan National Bank v. Robertson*, 372 U. S. 591 (1963); *Buffern v. Chase National Bank of N. Y.*, 192 F. 2d 58 (C.C.A. 2), cert. den. 342 U. S. 944.

Petitioner voluntarily maintains and operates its full service branch bank in Philadelphia for the express purpose of competing with the local Pennsylvania banks in Philadelphia (212 Pa. Superior Ct. at 194, 240 A.2d at 95). By its own rules, it permits its depositors to deposit their funds

[4] Respondents presented these arguments to the Superior Court but they were not decided by that Court.

in Philadelphia and withdraw them in New Jersey, or visa versa, or in any combination thereof (212 Pa. Superior Ct. at 194, 240 A.2d at 95). Petitioner has admitted that an attachment in New Jersey naming the Bank as a garnishee has always been considered by it to attach a depositor's funds in New Jersey and Pennsylvania equally (R. 35a-36a). The Superior Court, given these facts, held that the right of the respondents to attach Charles' funds on deposit with the Bank is coextensive with the Bank's own rules permitting Charles to withdraw its funds from the Bank (212 Pa. Superior Ct. at 194; 240 A.2d at 95).

Petitioner is asking your Honorable Court to hold that it may enter into Philadelphia, compete equally and on a par against local Philadelphia banks, obtain the full protection of the Philadelphia ordinances and Pennsylvania Statutes, yet be shielded against being made a garnishee in Philadelphia even though its competitor banks are not afforded the same privilege.

To support its position, petitioner relies on *Merchantile National Bank v. Langdeau*, 371 U. S. 555 (1963). We respectfully submit that the *Langdeau* case is not applicable to the instant action for several reasons. In that case the Court was not dealing with a matter where the national bank had a branch office. That case did not concern itself with interstate banking, but merely intercounty banking, and the concurring opinion in *Michigan National Bank v. Robertson*, supra, makes a clear distinction between these two concepts. In addition, of course, the matter *sub judice* deals with a case where the bank is a garnishee, and not where it is a direct defendant, as it was in the *Langdeau* case.

We respectfully submit that petitioner has cited no cases concerning the effect of interstate branch banking on Section 94, the proposition decided by the Superior Court. This may be because there are so few national banks with inter-state branch banks. It may be because under the *National Banking Act* as it now exists, new interstate branch banking by national banks can not occur (212 Pa.

Superior Ct. at 190). For whatever reason, petitioner has failed to show any conflicts between the decision of the Superior Court and any applicable federal court decisions on the issue of inter-state branch banking, the sole issue before this Court.

We respectfully suggest that since a bank may waive Section 94, and since:[5]

> "if the national bank has a branch established for conducting general business, in the jurisdiction, the bank is doing sufficient business in that jurisdiction to constitute waiver of Section 94"

and since the petitioner's own rules clearly show a waiver of Section 94, the opinion of the Superior Court of Pennsylvania is correct, both in its law, and in its practical effect. For these reasons, we submit, no substantial question has been raised by the Bank which warrants review by your Honorable Court.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

YALE B. BERNSTEIN
Attorney for Respondents

Of Counsel:
BRICKLEY, TORPEY & BERNSTEIN
1300 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

Dated: October 4, 1968.

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[5] *"An Assault on the Venus Sanctuary of National Banks"*: 34 Geo. Wash. L. R. 765, 777.